Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition for Declaratory Ruling that AT&T's	)	WC Docket No. 02-361
Phone-to-Phone IP Telephony Services Are	)	
Exempt from Access Charges	)	
	)	

REPLY COMMENTS OF AT&T CORP.

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TABLE OF CONTENTS

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Pursuant to the Commission's *Public Notice*,[1] AT&T Corp. ("AT&T") submits these reply comments in support of its petition for a declaratory ruling that its phone-to-phone IP telephony services are now exempt from the "carrier's carrier" charges authorized by 47 C.F.R. § 69.5.[2]

INTRODUCTION AND SUMMARY

All commenters in this proceeding appear to agree that the Commission should adopt rules in its *Intercarrier Compensation*[3] proceeding (or elsewhere) that require the same cost-based charges for all services that use identical local exchange facilities and that eliminate the distortions and arbitrage opportunities that are inherent in the current regime in which above-

[1] *Wireline Competition Bureau Seeks Comment on AT&T's Petition for Declaratory Ruling That AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, WC Docket No. 02-361, Public Notice, DA 02-3184 (Nov. 18, 2002); Pleading Cycle Revised, DA 02-3334 (Dec. 3, 2002).

[2] Appendix A lists the parties filing comments.

[3] *Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, 16 FCC Rcd. 9610 (2001).

cost and inefficient access charges apply to certain services, but not others. The fundamental issue in this proceeding is what compensation arrangements should apply *in the interim* to phone-to-phone and other Voice over Internet Protocol ("VOIP") services that require substantial and speculative investments in Internet technologies, that enable a vast array of enhanced and information services, but that will often initially provide no net changes in protocol or content and thus constitute "telecommunications services" under many definitions of that term. Should these speculative and rapidly evolving Internet services be taxed by being subjected to above-cost and inefficient "carrier's carrier" access charges whenever the services can be identified as telecommunications services – at the risk of stifling innovation and investment and with the certainty of burdening all VOIP services with substantial administrative and monitoring costs? Or should all providers of all VOIP services be permitted to obtain access under the local end-user business tariffs that apply to information services and that fully compensate incumbents for all legitimate costs?

As AT&T explained in detail in its petition, the answer to these questions is clear. First, access charge assessments are foreclosed by the Commission's longstanding policy of exempting all VOIP services from access charges – regardless of whether they are classified as telecommunications services or information services – pending the adoption of prospective, nondiscriminatory rules in the *Intercarrier Compensation* proceeding or elsewhere. Second, in all events, because AT&T's phone-to-phone IP telephony services are provided over the Internet, the Congressional mandate that the Commission foster the development of the Internet prohibits any requirement that above-cost and inefficient access charges apply to these services.

Indeed, AT&T's claim that access charge assessments are contrary to the Commission's longstanding "wait and see" policy has now been supported by one of the two

incumbent LECs (Sprint) who precipitated this petition by engaging in what AT&T had understood to be self-help attempts to impose access charges on AT&T's phone-to-phone IP telephony services. Sprint now acknowledges that the Commission's *Universal Service Report*[4] created an "exception for phone-to-phone IP telephony" to the general rule of 47 C.F.R. § 69.5 that access charges apply to services that meet the definition of telecommunications service and that the *Report* "correspondingly enlarged the enhanced services exemption – until [the Commission] issues a more definitive pronouncement." Sprint at 6-7; *accord* NYDPS at 3.

The other incumbent LECs argue that phone-to-phone IP telephony cannot be found to be exempt from access charges if it is telecommunications. These incumbents note that Rule 69.5 provides that carrier's carrier charges apply to telecommunications services, and they contend that the Commission could not create an exception to Rule 69.5 in the *Universal Service Report* proceeding (and could not ratify the exception in this proceeding) because, they believe, exceptions to such rules can only be adopted in notice-and-comment rulemakings.

But that view of the Commission's authority is simply wrong. Federal agencies that adopt general rules have inherent authority to interpret them – in policy statements such as the *Universal Service Report* and adjudications such as this proceeding – as inapplicable to particular circumstances when the public interest so requires.

Further, there is no doubt that the Commission has long followed the "wait and see" policy announced in the *Universal Service Report* and treated all phone-to-phone IP telephony services as exempt from access charges. Most starkly, the Commission refused to

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[4] *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd. 11,501 (1998) ("*Universal Service Report*").

even initiate a proceeding on the 1999 U S WEST petition for a declaratory ruling that access charges apply to phone-to-phone IP services that collaterally attacked the exemption established in the *Universal Service Report*. In this regard, when Qwest withdrew the petition (28 months after it was filed), Qwest acknowledged that it had inappropriately asked the Commission to "reevaluate" its longstanding policies in a declaratory ruling proceeding and that these were matters for the prospective *Intercarrier Compensation* proceeding or some other rulemaking. And that the Commission's longstanding policy has been to treat all VOIP services as exempt from access charges and other legacy regulations is confirmed in (1) the prior public statements of individual Commissioners, (2) the recent statements of Chairman Powell and Commissioner Martin, and (3) other actions of the Commission over the intervening years. The only way the incumbents can dispute that the Commission has adopted a "wait and see" policy is by misstating or ignoring all these historical facts.

Second, the Commission's policy applies with special force to AT&T's phone-to-phone IP services, for these are provided over the Internet and required substantial investments to upgrade the Internet. Taxing these services with above-cost access charges would thus violate the mandate of section 230(b) of the Act that the Commission foster the development of the Internet. 47 U.S.C. § 230(b). And there is no substance to the contention of certain incumbents that AT&T's services are not offered over the Internet. AT&T's services use the same common Internet backbone facilities that carry other Internet traffic.

The incumbent LECs also make spurious claims that the access charge exemption for VOIP services is unlawful because it creates arbitrage opportunities and purportedly is not technologically neutral. But the arbitrage opportunities exist by virtue of the differential rates

that apply to information and telecommunications services, and here the question is simply whether particular services should obtain access at one set of rates or the other. And because Congress has mandated that the Commission adopt policies that foster the Internet and Internet services and because the Commission has justified the ESP exemption on this mandate, rules that encourage investment in Internet technologies and services cannot be unlawful for that reason.

The incumbent LECs simply ignore the technical, practical, and operational problems – and the discrimination among identical services – that would result from the incumbents' proposed rule that access charges apply to any phone-to-phone IP telephony services that can be identified as telecommunications. Because phones and other CPE increasingly perform the same IP conversions as do computers, distinctions between phone-to-phone and computer-to-computer services are inherently arbitrary, and phone-to-phone IP services increasingly involve net protocol conversions and are enhanced services under the Commission's rules for this reason alone. A rule that would impose access charges on those phone-to-phone IP telephony calls that are telecommunications would thus discriminate *among* phone-to-phone IP telephony calls that make identical uses of local networks.

Further, because IP allows enhanced and basic services to be seamlessly offered over a single platform and permits an evolving continuum of enhanced and basic services, a service that a customer obtains as a basic telecommunications service today can be an enhanced service tomorrow. Thus, any attempt to impose access charges on services because they are currently basic telecommunications services can, in Chairman Powell's words, "be almost immediately frustrated by innovative changes to the service and technology that these advanced

networks allow."[5] All these factors underscore why the Commission cannot responsibly adopt a rule allowing access charges to be assessed on phone-to-phone IP telephony services until it has fully evaluated the full range of VOIP services and whether any distinctions are technologically and rationally sustainable.

Finally, the incumbent LECs make an array of other claims that do not withstand cursory scrutiny. They baldly assert that adoption of AT&T's proposed exemption from interstate access charges would prevent them from recovering their interstate costs and would imperil universal service. However, through its *Universal Service, CALLS, MAG, Methodology* and *Rural Task Force Orders*, the Commission has taken the necessary steps to identify and remove implicit subsidies from interstate access charges paid by carriers, to raise subscriber line charge caps to allow increased recovery of interstate line costs from end users, and has set up additional explicit universal service funding mechanisms both to support interstate line costs above the SLC caps and to support local services to sustain universal service. Furthermore, the reality is that the phone-to-phone IP telephony services at issue continue to represent a small fraction (1% - 5%) of interexchange calls. The suggestion that the Commission's "wait and see" policy pending adoption of prospective rules in the *Intercarrier Compensation* proceeding or elsewhere could imperil local exchange carriers or universal service is spurious.

[5] *Universal Service Report*, at 11,625 (Powell, Commissioner, concurring).

ARGUMENT

I. THE COMMISSION'S POLICY HAS BEEN TO EXEMPT ALL VOIP SERVICES FROM ACCESS CHARGES, PENDING THE ADOPTION OF NEW PROSPECTIVE RULES, AND THIS POLICY IS PLAINLY LAWFUL.

With the exception of Sprint, the ILECs argue that Rule 69.5(b), 47 C.F.R. § 69.5(b), justifies denial of AT&T's petition and that the Commission's policies set forth in the *Universal Service Report* to Congress are irrelevant to the application and interpretation of Rule 69.5(b).[6] To the contrary, those policies are relevant and directly support AT&T's petition. AT&T's petition is merely asking the Commission to ratify the "wait and see" policy that it has been following at least since its 1998 *Universal Service Report* to Congress. Under this policy, all phone-to-phone and other VOIP services have been treated as exempt from the carrier's carrier ("access") charges authorized by Rule 69.5 of the Commission's rules and as subject to the ESP exemption – regardless of whether they were classified as "telecommunications services" or as enhanced services – pending future rulemaking proceedings or other action by the Commission. The only way the incumbent LECs can deny that the Commission has long followed this "wait and see" policy is by ignoring or misstating this history and by making extraneous arguments that are baseless as a matter of law.

A. The *Universal Service Report* Lawfully Adopted A Policy Of Exempting Phone-To-Phone IP Services From Access Charges.

A number of incumbent LECs argue that the *Universal Service Report* does not and cannot evidence a Commission policy of exempting any phone-to-phone IP telephony services that are classified as telecommunications services from access charges. Some LECs

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[6] *See, e.g.*, BellSouth at 9-10; SBC at 6-10; USTA at 5-8; Verizon at 2-5.

assert that all the Commission did was reserve for a later day the precise regulatory classification of IP telephony and evinced no intent to exempt phone-to-phone IP telephony from access charges.[7] Other LECs do not dispute what the *Report* said but reason that Rule 69.5 provides that carrier's carrier charges apply to telecommunications services and that the only services that the rule's terms exempt from access charges are enhanced services and information services.[8] These LECs contend that it follows that additional exemptions could only be created in a notice-and-comment rulemaking.[9] Thus, despite the *Universal Service Report*'s rejection of the claim that carrier's carrier charges apply to any phone-to-phone IP telephony that is a "telecommunications service," the incumbents argue that the only issue in this proceeding is whether AT&T's service meets this definition.

First, contrary to certain of these assertions, the Commission's *Universal Service Report* to Congress expressly addressed the regulatory treatment of all VOIP telephony services. It tentatively concluded that computer-to-computer and computer-to-phone services are enhanced or information services, and that "certain" phone-to-phone IP telephony services appeared to be telecommunications services. But it refused to make "any definitive pronouncements" and "defer[red] a more definitive resolution of these issues" to a future rulemaking or other proceeding that would comprehensively address these services and determine if this tentative distinction "accurately distinguishes between phone-to-phone and

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[7] *See, e.g.*, BellSouth at 6, 9-10; California RTCs at 2-3; Qwest at 14-17, 23; SBC at 3-5, 8-9, 16; USTA at 4-11; Verizon at 2, 5.

[8] *See, e.g.*, Minnesota Independent Coalition at 3-5; OPASTCO at 3-4; Sprint at 3-7, 9.

[9] *See, e.g.*, BellSouth at 15; Qwest at 23-24; SBC at 10-11.

other forms of IP telephony, and is not likely to be quickly overcome by changes in technology."[10]

The Commission stated that the future proceeding would address the "regulatory requirements to which phone-to-phone providers may be subject if we were to conclude that they are 'telecommunications carriers'" because they provide "telecommunications services." With regard to access charges, the Commission stated that even if it were to conclude that "certain forms of phone-to-phone IP telephony service are 'telecommunications services,'" and "obtain the *same* circuit-switched access as obtained by other interexchange carriers," the services would not be subject to the same access charges as apply to circuit switched calls; *i.e.*, the carrier's carrier charges imposed by Rule 69.5. Rather, in that event, the Commission said that "we *may* find it reasonable that they pay *similar* access charges." Conversely, the Commission noted that, because of the costs of determining whether particular phone-to-phone VOIP services were subject to particular per minute access charges, the Commission would then "face difficult and contested issues" and may decline to require even "similar access charges." *Universal Service Report*, ¶ 91 (emphases added).

The *Universal Service Report* thus treats all phone-to-phone IP telephony services as exempt from the carrier's carrier charges imposed by Rule 69.5 – and as potentially subject at most to "similar access charges" that the Commission would impose in a future rulemaking. Indeed, this point is so clear that it has been acknowledged by one of the two incumbent LECs who precipitated this proceeding by engaging in what AT&T understood to be an attempt to

[10] *Universal Service Report*, ¶¶ 90-91.

assess access charges by engaging in self-help.[11] But this ILEC (Sprint) has now explained (at 2) that this was not its intent, and Sprint acknowledges that the Commission's 1998 "*Universal Service Report* created an exception from the normal classification of services" that are subject to access charges based on whether they are basic telecommunications services or enhanced services. Sprint at 3. In particular, Sprint acknowledges that the Commission "created an [access charge] exception for phone-to-phone IP telephony [that is a telecommunications service] – and correspondingly enlarged the enhanced services exemption – until it issues a more definitive pronouncement." *Id.* at 7. As Sprint states, this "suggests that an obligation to pay access charges" imposed in a future proceeding "would only have forward-looking effect." *Id.* The NYDPS has acknowledged the point as well, stating that the Commission "has allowed all VOIP calls to be treated as 'information services,' rather than as 'telecommunications services.'" NYDPS at 3.

Second, the LECs' mechanical argument that the Commission could not have interpreted the scope of Rule 69.5 in the *Universal Service Report* is simply wrong. Federal agencies that adopt general rules have inherent authority to interpret them[12] – in policy statements such as the *Universal Service Report* and adjudications such as this proceeding – as inapplicable to particular circumstances when the public interest so requires.[13] In addition, under

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[11] *Compare* AT&T Petition at 21 *with* Sprint at 2-3.

[12] *See, e.g.*, *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 566 (1980); *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945); *Consarc Corp.* v. *Treasury Dept.*, 71 F.3d 909, 915 (D.C. Cir. 1995) (even greater deference is owed to an agency's interpretation of a rule than to an agency's interpretation of a statute it administers).

[13] *See, e.g.*, *SEC* v. *Chenery Corp.*, 332 U.S. 194 (1947); *see also Belland* v. *PBGC*, 726 F.2d 839, 845-46 (D.C. Cir. 1984); *Trans-Pacific Freight Conference of Japan/Korea* v. *Federal Maritime Comm'n*, 650 F.2d 1235, 1244-45 (D.C. Cir. 1980).

the Commission's Rule 1.3 (47 C.F.R. § 1.3), the Commission can create exceptions or exemptions to Rule 69.5 or any of the Commission's other regulations for "good cause" and "on its own motion" in any proceeding when the exception fosters the public interest. Indeed, courts have held that the authority of agencies to adopt general rules like 69.5 is "intimately linked to the existence of a safety valve procedure for consideration of an application for exemption based on special circumstances"[14] and the case for an exception is at its strongest when, as here, a carrier "proposes a new service" that was not offered at the time the general rule was initially adopted.[15]

Here, of course, Rule 69.5 was adopted in 1983 to apply to circuit switched services at a time when phone-to-phone and other VOIP services did not exist and before Congress mandated the adoption of policies to foster the development of the Internet and Internet services. Because phone-to-phone IP services represent a small fraction of interexchange telecommunications calling, there is no question but that the Commission lawfully could establish an exception to Rule 69.5 for VOIP services without conducting a notice-and-comment rulemaking, for the exception does not "eviscerate" the rule.[16]

Further, in addition to its authority under Rule 1.3, the Commission has broad inherent power to interpret its rules and to structure its proceedings in ways that foster the public interest.[17] In light of the profound operational, technological, and regulatory issues that would

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[14] *WAIT Radio* v. *FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

[15] *BellSouth* v. *FCC*, 162 F.3d 1215, 1224 (D.C. Cir. 1999) (internal citation omitted).

[16] *WAIT Radio*, 418 F.2d at 1159.

[17] *See Chenery Corp.*, 332 U.S. 194; *Bowles*, 325 U.S. at 413-14.

arise if VOIP services were subject to access charges when they might be found to be telecommunications, the Commission was free to deem all VOIP services to be information services pending a definitive classification in an appropriately broad proceeding.[18] There is thus no question that the Commission's *Universal Service Report* lawfully established, or evidenced, the Commission's policy of exempting phone-to-phone VOIP services from access charges.

The Commission's intent in this regard is underscored by the fact that it has elsewhere refused to subject phone-to-phone IP services to regulations applicable to telecommunications services. As discussed in the Joint Comments of the Association for Communications Enterprises, *et al*. at 10-11, another indication of the Commission's "wait and see" policy is the fact that the Commission rejected an RBOC's argument that the new consolidated telecommunications reporting worksheet issued by the Commission in 1998 required VOIP providers to pay various fees assessed on telecommunications services, including universal service. The Commission confirmed that it had not yet determined the regulatory status of VOIP services, and thus would not treat it as telecommunications. In rejecting the RBOC's argument, the Commission stated: "We note that the Commission, in the *Report to Congress*, specifically decided to defer making pronouncements about the regulatory status of various forms of IP telephony until the Commission develops a more complete record on

[18] *See AT&T Corp.* v. *FCC*, 220 F.3d 607, 628-32 (D.C. Cir. 2000). In any event, the Commission did provide an opportunity for notice-and-comment in its *Universal Service Report* proceedings. *See Universal Service Report*, ¶ 12.

individual service offerings. We, accordingly, delete language from the instructions that might appear to affect the Commission's existing treatment of Internet and IP telephony."[19]

B. The Commission Applied The *Universal Service Report* Precedent And Policy In Declining To Seek Comments On U S WEST's Petition For A Declaratory Ruling That Access Charges Apply To Any Phone-To-Phone IP Telephony Services That Are Telecommunications Services.

The ILECs, particularly Qwest (at 4), dismiss AT&T's reliance on the Commission's decision not to act on U S WEST's 1999 petition for a declaration that VOIP providers that employed "private networks" were obliged to pay carrier's carrier access charges. Contrary to Qwest's assertions, the Commission's actions following the *Universal Service Report* provide clear confirmation that the *Report* is a Commission precedent that established a policy that regardless of whether a particular phone-to-phone VOIP service might later be found to be telecommunications, these and all other VOIP services would not be subjected to access charges, pending a future rulemaking or other prospective future action by the Commission.

In reliance on the *Universal Service Report*, numerous firms began offering nascent phone-to-phone and other VOIP services by using local business lines to terminate (and in some cases also to originate) their calls. U S WEST responded to this development by filing a

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[19] *See 1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Services, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms*, Report and Order, 16 Comm. Reg. (P&F) 688, ¶ 22, 1999 WL 492955 (1999).

petition for an "expedited" declaratory ruling on April 5, 1999.[20] While acknowledging that phone-to-phone VOIP services carried over the Internet (such as AT&T's services) are not subject to access charges, U S WEST advanced the same argument with respect to IXCs' use of "private networks" that the ILECs and others had made in the proceedings leading to the *Universal Service Report* and that the ILECs make now: that ILECs are entitled to impose access charges whenever phone-to-phone IP services can be shown to be "telecommunications services" and not "enhanced services" or "information services."[21]

U S WEST's petition clearly presented an "actual controversy," but the Commission did not put the petition out for public comment and initiate a proceeding at any time during the more than two years and four months in which the petition was pending. The only explanation for its failure to do so is that U S WEST was collaterally attacking the determinations that the Commission had made in the *Universal Service Report* and the Commission's policy of exempting phone-to-phone VOIP services from access charges pending a future rulemaking. As the Commission has repeatedly stated, it will initiate proceedings in response to petitions for rulings only when the underlying petitions present potentially meritorious claims,[22] and as stated by Qwest (U S WEST's successor in interest), a "declaratory

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[20] *See Petition of U S WEST, Inc. for Declaratory Ruling Affirming Carrier's Carrier Charges on IP Telephony*, Petition for Expedited Declaratory Ruling, filed Apr. 5, 1999 ("U S WEST Petition").

[21] *Id.* at 1, 7-14.

[22] *See, e.g.*, *FCC Staff Releases Its Interim Report on Spectrum Study of the 2500 – 2690 MHz Band: The Potential for Accommodating Third Generation Mobile Systems*, Public Notice, 15 FCC Rcd. 22,310, at *146 (2000); *Amendment of Parts 2 and 74 of the Commission's Rules and Regulations To Allocate the 38.6-40 GHz to TV Auxiliary Broadcast Pickup Stations on a Secondary Basis*, Report and Order, 1982 FCC Lexis 746, at *8 (1982); *Petition for the Adoption of Procedures to Limit the Time in Which the Commission Must Respond to a Petition for Rulemaking*, Memorandum Opinion and Order, 82 F.C.C.2d 403, ¶ 7 (1980).

ruling proceeding is not a proper vehicle to overturn existing precedent." Qwest at 4. The refusal to take action on the U S WEST petition thus confirms the nature of the Commission's "wait and see" policy and its unwillingness to reconsider it.

Qwest asserts that AT&T's claim that the Commission's inaction on this petition reflected the Commission's "wait and see" policy is "frivolous" (at 4), but the only way that Qwest can make this assertion is by misstating the facts and by ignoring its own stated reasons for withdrawing the petition (over two years later). Qwest implies that its petition was pending only briefly and was then "withdrawn by Qwest after its merger with U S WEST prior to the Commission releasing it for public comment." Qwest at 4. In fact, the petition was withdrawn on August 10, 2001 – over two years and four months after the petition was filed (and also more than a year after the merger closed on June 30, 2000).[23] Had the petition presented a colorable claim rather than an attempt to "overturn existing precedents" and policies, the Commission would have put the 1999 U S WEST petition out for comment promptly – as it did with the AT&T petition at issue here.

Qwest also now misstates its reasons for withdrawing the petition in August, 2001. Qwest did not withdraw the petition because "it perceived that the primary provider of phone-to-phone IP telephony services was the pre-merger Qwest," as it now contends. Qwest at 4. Qwest's withdrawal letter said no such thing, for U S WEST's petition had identified Qwest

[23] *See* Letter from Melissa E. Newman, Qwest Vice President-Federal Regulatory, to Magalie Roman Salas, Secretary, FCC (Aug. 10, 2001) ("Qwest Withdrawal Letter").

as the sixth of the IXCs who were providing phone-to-phone VOIP service and said that the pre-merger Qwest provided service in only two states in the U S WEST region.[24]

What Qwest's withdrawal letter did, by contrast, was to acknowledge that the Commission's policy is to exempt phone-to-phone VOIP from access charges pending the adoption of new rules in a rulemaking. Qwest admitted that an "independent resolution" of the issues it raised would be "inappropriate" in a declaratory proceeding[25] – thus conceding the legality of the VOIP providers' practices under the Commission's longstanding policy and interpretation of its rules. Qwest went on to concede AT&T's and Sprint's understanding of what the *Universal Service Report* had indicated: that a subsequent rulemaking (the *Intercarrier Compensation* proceeding), would be the appropriate forum to address Qwest's concerns because that proceeding allows the Commission "to reevaluate, and perhaps comprehensively to revise, its various regulations."[26] The reevaluation was necessary only because, as Qwest well knew, the Commission's existing policy was that all phone-to-phone VOIP services are exempt from access charges.

C. The Prior Statements Of Individual Commissioners Confirm The Commission's "Wait And See" Policy.

Finally, that the Commission has long followed this "wait and see" policy is confirmed by the statements of individual Commissioners.

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[24] U S WEST Petition at 4.

[25] Qwest Withdrawal Letter at 1.

[26] *Id.*

First, in the *Universal Service Report*, Commissioner Harold Furchtgott-Roth opposed even the Commission's tentative statement that it might impose access charges on phone-to-phone VOIP services in a future rulemaking. He noted that phones "already are capable of converting voice to IP packets" and that permitting access charge assessments on phone-to-phone IP telephony would thus create a regulatory framework that "is not only artificial and fragile, but also exposes the futility of assessing fees on specific Internet content. Because this framework would be inconsistent with current treatment of similar services, consumers and industry quickly would develop methods to avoid any new fees."[27]

Commissioner Powell, too, argued against subjecting innovative new VOIP services to the legacy regulations applicable to circuit switched services:

> The infinite flexibility of IP switched-packet networks[ ] has blurred the[ ] distinctions [between telecommunications and information services], making them difficult, if not impossible, to maintain. As we are seeing, one now can transmit voice, in addition to data, using a protocol that allows for a significant degree of computer processing and other advanced capabilities. . . . If innovative new IP services were all thrown into the bucket of telecommunications carriers, we would drop a mountain of regulations, and their attendant costs, on these services and perhaps stifle innovation and competition in direct contravention of the Act.[28]

Similarly, former Chairman Kennard repeatedly stated that access charges should be driven to cost-based levels and that, during the transition, these charges and other "legacy" telephony regulations should not be imposed on IP telephony.[29]

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[27] *Universal Service Report*, at 11,636-11,637 (Furchtgott-Roth, Commissioner, dissenting).

[28] *Id.* at 11,623 (Powell, Commissioner, concurring).

[29] *See Kennard Says He Won't Regulate Internet Telephony*, Warren's Washington Internet Daily, May 25, 2000 ("Kennard Interview").

> [D]uring this transition, the answer is not to saddle nascent technology with the increasingly obsolete legacy regulations of the past. . . . Their architectures fundamentally differ, and so should their rules. In short, one-size regulation does not fit all. It just doesn't make sense to apply hundred-year old regulations meant for copper wires and giant switching stations to the IP networks of today. . . . And I also oppose any plan to levy any new fees or taxes on IP telephony.[30]

He also stated:

> It's important to recognize that legacy regulation is not necessarily appropriate to emerging network technologies, so when people start asking "when are you going to regulate IP telephony," my answer is always the same – never.[31]

More recently, Chairman Powell called IP telephony one of the "key sources of revenue growth offering consumers a wealth of new benefits in the years to come,"[32] and he elsewhere stated that the Commission has refused to treat VOIP as a "new form of an old friend" by subjecting it to the regulations applicable to circuit switched services.[33] Commissioner Martin has made the identical point, noting that "we have not chosen to regulate IP Telephony, but are continuing to monitor marketplace developments. We refuse to just assume that it is a new form of an old friend. . . . Indeed, VOIP presents an incredible opportunity for consumers worldwide and we have found that our approach has encouraged its development."[34] All these statements confirm the Commission's "wait and see" policy.

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[30] Chairman William E. Kennard, Remarks Before the Voice Over Net Conference, Atlanta, Georgia (Sept. 12, 2000).

[31] *See* Kennard Interview.

[32] *See* Prepared Remarks of Michael K. Powell, Chairman, FCC, delivered at the Goldman Sachs Communicopia XI Conference, New York, NY, Oct. 2, 2002, at 2.

[33] Remarks of Michael K. Powell, Chairman, FCC, delivered at the ITU 2nd Global Symposium for Regulators, Geneva, Switzerland, Dec. 4, 2001, at 3.

[34] Welcoming Remarks by Kevin J. Martin, Commissioner, FCC, delivered to the African VOIP Conference, Supercomm 2002, Atlanta, Ga., June 5, 2002, at 2.

II. THE CONGRESSIONAL MANDATE THAT THE COMMISSION FOSTER THE INTERNET INDEPENDENTLY REQUIRES THE REQUESTED RULING AND FORECLOSES ANY ARGUMENT THAT THE COMMISSION'S POLICIES VIOLATE ANY RULE OF "TECHNOLOGICAL NEUTRALITY."

The Commission's longstanding policy not to subject IP telephony to access charges applies with special force to AT&T's phone-to-phone IP telephony services, because they are provided over the Internet and required substantial investments to upgrade the Internet and allow it to provide high quality voice transmissions. The exemption of these services from access charges and other legacy regulations is required by section 230(b) of the Telecommunications Act of 1996. The Act's provisions also foreclose the incumbent LECs' otherwise spurious claims that the Commission's longstanding policies are unlawful because they are not technologically neutral.

In the Telecommunications Act of 1996, Congress mandated that the nation's communications policies "promote the continued development of the Internet" and "preserve the vibrant and competitive free market that presently exists for the Internet . . . unfettered by Federal or State regulation." 47 U.S.C. § 230(b). Contrary to the ILECs that would limit this protection of the Internet only to Internet content,[35] the Commission has closely identified VOIP telephony services with the Commission's Internet policies, both for domestic policy and for purposes of international settlement rates. The *Universal Service Report* itself associated "the Internet and the notion that a packet-switched network could be used to complete a long distance call," and the Commission explicitly deferred determinations that might have allowed access charges to be imposed on phone-to-phone IP telephony because that broader policymaking

[35] *See* Minnesota Independent Coalition at 5. In addition to the Commission's authoritative interpretation of its Internet-related policies, the statute's language does not support a content-based limitation on federal policies.

would involve "dealing with emerging services and technologies in environments as dynamic as today's Internet and telecommunications markets." *Universal Service Report*, ¶¶ 2, 90.

Policies that preclude providers of services delivered over the Internet from obtaining access at the end-user service rates that apply to other services, and that instead require them to pay bloated, above-cost access charges, would clearly contravene the Congressional mandate. Such a requirement would amount to a tax on the Internet, and would deter the kinds of investments in Internet backbone facilities that AT&T (and others) have begun to make, contrary to the Congressional requirement. Thus, several ILECs acknowledge that IP telephony services that are provided over the Internet are entitled to the ESP exemption, whether or not the services could be found to be telecommunications. For example, USTA concedes that "[t]elephony that has traversed over the Public Internet is still considered to be an information service." USTA at 2.

However, other ILECs make a series of arguments that AT&T's phone-to-phone VOIP services should hereafter be subject to access charges. None has substance.

A. Because AT&T's Services Are Provided Over The Internet, They Cannot Be Taxed With Above-Cost Levies That Do Not Apply To Other Services.

First, some ILECs dispute that all services that use the Internet can lawfully be deemed to be information services. They argue that phone-to-phone IP telephony services are purportedly telecommunications services and that anything that is a telecommunications service is subject to access charges, irrespective of the network over which it is sent.[36] This argument is wrong as a matter of law even in the case of VOIP services that are not transmitted over the

Internet. *See* Section I, *supra*. And it is plainly wrong in the case of services that are transmitted over the Internet, for the argument is foreclosed by the Congressional decree.

Qwest, for example, acknowledges that the Internet is immune from levies that amount to taxes, but it contends (at 8) that it is "absolutely irrelevant" that AT&T's service is transmitted over the "public Internet." It contends that the applicability of access charges to a service depends on how the service is classified and not on the kind of facilities over which the service is sent. By this "logic," all services offered over the Internet could be taxed in these ways even though the effect would be to inhibit the investments in the Internet that make the services possible.[37] The reality is that the only way to preserve and promote the Internet is to exempt services offered over it from excessive charges and other economic taxes or monopoly rent-seeking.

Ironically, Qwest's predecessor-in-interest (U S WEST) recognized this point in its April, 1999 declaratory ruling petition. There, U S WEST (unsuccessfully) sought a declaratory ruling that only phone-to-phone VOIP services that do *not* use the Internet should be subject to access charges.[38] It thus then acknowledged that phone-to-phone VOIP services that use the Internet must be subject to very different rules and regulations by virtue of section 230(b) of the Communications Act and sound policy.

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[36] *See, e.g.*, Alaska Exchange Carriers Ass'n at 6; Qwest at 10-14; SBC at 1.

[37] The ILECs' logic also leads them to seek to impose access charges on computer-to-phone IP telephony. *See* SBC at 13 & n.34.

[38] U S WEST Petition at 1.

Second, other ILECs dispute that AT&T's services use the Internet.[39] They acknowledge, as they must, that AT&T's services are carried over common Internet backbone facilities that carry public Internet traffic, and they acknowledge that AT&T has made substantial IP investments to enhance the capabilities of its common Internet backbone and to enable it to provide quality voice transmissions. But they contend that AT&T's phone-to-phone VOIP services should be deemed not to use the Internet because the traffic is currently carried end-to-end over AT&T's backbone and is not passed through peering points and carried over Internet backbone facilities of other entities.

This is wrong, for several reasons. Foremost, the Internet is comprised of interconnected backbone facilities, and traffic uses the Internet if it is carried over these facilities, regardless of whether it passes through peering points. For example, there is a vast amount of traffic that is carried between AT&T's ISP customers and between web sites connected directly to AT&T's Internet backbone. This is indisputably Internet traffic, even though it does not pass through peering points and is not carried over other backbones. For purposes of the Congressional mandate, "Internet" is defined broadly and consistently with this as "the international computer network of both Federal and non-Federal interoperable packet switched data networks." 47 U.S.C. § 230(f)(1). Especially in as dynamic an environment as exists for the Internet and services delivered over the Internet, a policy determination that attempted to constrain the Internet as the ILECs' argument does – by attempting artificially to define away AT&T's Internet service and that of many other carriers based on a technical

[39] *See, e.g.*, Beacon at 1; California RTCs at 2-3; Fred Williamson and Assoc. at 7; Frontier at 2; GVNW Consulting at 6; Rural Iowa Independent Tel. Ass'n at 3; SBC at 3; USTA at 7.

pathway distinction – could significantly constrain protection for Internet services and facilities in a broad array of contexts.

Further, the reason that AT&T's phone-to-phone IP services are carried today over AT&T's backbone is that it covers the entire country and AT&T has no need to send the IP traffic through peering points. But contrary to the claims of USTA (at 7), there is no reason why phone-to-phone IP telephony could not be carried over multiple IP backbones, and standards and other arrangements can be implemented that would allow phone-to-phone IP calls to originate on a regional Internet backbone and to be terminated by AT&T or other entities with national Internet backbones. The substantial investments that AT&T has made to upgrade its Internet backbone for voice traffic are necessary to allow such services to be offered over the public Internet.

Because AT&T's phone-to-phone VOIP services are offered over the Internet, the Commission should declare that they are exempt from above-cost access charges by reason of section 230(b) of the Act, even if the Commission were hereafter prospectively to order other phone-to-phone VOIP services (that are carried over private IP networks) to pay carrier's carrier charges.

B. The Commission's "Wait And See" Policy Neither Violates Any Rule Of Technological Neutrality Nor Illicitly Creates Arbitrage Opportunities.

Section 230(b) also refutes the incumbent LECs' arguments that the Commission's policy of exempting VOIP from access charges violates a policy of technological

neutrality.[40] In particular, the incumbent LECs' basic argument is that the developments that permit the Internet to be used to provide high quality voice transmission are no different in kind than the previous upgrades of long haul transmission facilities from copper and microwave to fiber and from analog to digital, and that the use of IP and the Internet to carry interexchange services should no more warrant an exemption from access charges than did the earlier developments. Quite the contrary, section 230(b) recognizes that the development of the Internet is different in kind from prior technological advances, and the Congressional mandate applies to the development of the Internet, irrespective of the particular technologies that are deployed. Even the ILECs' consultants admit that the "Internet as a telecommunications network is certainly revolutionary" (ICORE at 6), and what makes the Internet and IP technology revolutionary is that they blur or obliterate prior distinctions between voice and data, between basic and enhanced services, and even between local and long distance. They allow what are today classified as basic and enhanced services to be delivered on an integrated basis over a single platform, and the Internet platform that AT&T is using allows the provision of a rapidly evolving continuum of enhanced and basic services to be provided to end users – and allows a broad range of computers, terminals and other CPE to be used in connection with these services.

The Commission's policy of allowing all providers of IP telephony services to avail themselves of the ESP exemption – pending the adoption of future prospective rules – is not a preference for a technology. It is recognition that many of the services that the platform allows are enhanced today, that those services that are basic can quickly evolve into enhanced services, that the costs of identifying which of these services are and are not telecommunications

[40] *See, e.g.*, GVNW Consulting at 3-4; NECA at 2.

services subject to access charges can be great, and that allowing access charges to be assessed on any of these services risks discrimination among firms using identical platforms for identical or similar purposes. It further is recognition that the services reflect a small fraction of total calling, and while a rule that exempts the services from access charges imposes little cost on incumbents, a rule allowing access charges to be assessed could stifle innovation in rapidly evolving services. In short, it is recognition that, regardless of how individual services are classified, the reasons for the ESP exemption apply to all these evolving services, and that during the transition to future cost-based charges that apply the same rates to all usage of local exchanges, it is better to extend the rates applicable to enhanced services to these services than to subject them to access charges that are above-cost and inefficient.

In this regard, Congress mandated that the development of the Internet be "unfettered" by the applicable legacy regulations developed for circuit switched services precisely because it understood that it would be difficult and costly to apply these measures to this new medium, and that any efforts to do so could retard the growth and development of the Internet. 47 U.S.C. § 230(b)(2). Extending the ESP exemption to VOIP services – pending future action – was and is plainly necessary to meet the Congressional mandate.[41]

The ILECs' related contention that the VOIP exemption will promote arbitrage overstates the issue in two respects. For one, only a small fraction of interexchange traffic (1% - 5%) is VOIP, and contrary to the ILECs' assertions, it would take massive investments and time to move significant traffic to the Internet. And, second, the arbitrage opportunities that exist are

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[41] *See* Level 3 at 6-7; Joint Comments of Ass'n for Communications Enterprises *et al.* at 19-20; *infra* Section III.

products of the different rates that apply to enhanced service providers and telecommunications carriers by reason of the rules that imposed above-cost and inefficient access charges on interexchange services and that allow enhanced service providers to obtain access by subscribing to end-user services under local business rates that are closer to cost. By driving access rates closer to cost – as the Commission has done in a series of orders over the last few years – the arbitrage incentives are reduced, and the opportunities will disappear altogether when the Commission adopts rules, in the *Intercarrier Compensation* proceeding or elsewhere, that provide identical rates for all users of local exchanges. The Commission has taken the correct first step in allowing VOIP services to benefit from local charges more closely aligned to costs than are access charges, and it has the opportunity to address the causes of resulting incentives in its comprehensive *Intercarrier Compensation Rulemaking*.

III. THE ORIGINAL REASONS FOR EXEMPTING VOIP SERVICES FROM ACCESS CHARGES CONTINUE TO BE FULLY APPLICABLE.

Sprint acknowledges that access charges cannot be assessed on the phone-to-phone VOIP services that AT&T has offered in the past, but it asks the Commission to adopt a rule in this proceeding that would permit access charges to be assessed prospectively on any phone-to-phone IP services that are determined to be telecommunications services. Sprint at 7. It claims that the *Universal Service Report* and the Commission's "wait and see" policy were unjustified departures from the prior framework in which the applicability of access charges turned solely on whether individual services were classified as telecommunications services or enhanced services. These claims do not withstand analysis. The reasons for exempting all VOIP services from access charges continue to be valid today.

The ILECs contend that phone-to-phone VOIP telephony is no longer a nascent or emerging service and thus that a major predicate to the policy reflected in the Commission's *Universal Service Report* no longer exists.[42] However, it is undisputed that VOIP services continue to represent a small fraction of interexchange services. Moreover, as the Commission recognized, the pertinent question is not the chronological age of VOIP technology. Rather, it is whether VOIP has reached a stage where its capabilities, potential, and relation to other services are understood and have stabilized sufficiently to permit clear and non-arbitrary regulatory distinctions to be drawn that would result neither in discrimination nor the stifling of innovation. *See Universal Service Report*, ¶¶ 90-91.

A. Extension Of Access Charges To VOIP Services Would Require Arbitrary And Discriminatory Line-Drawing.

The incumbents' claims that access charges should apply to phone-to-phone IP telephony rest on their assumption that these services perform no "net protocol conversions" and therefore are telecommunications services and not information services under the prevailing definitions of those terms.[43] However, because phones and other CPE increasingly perform the same IP conversions as do computers, the incumbent LECs' proposed distinctions between phone-to-phone, computer-to-phone, and computer-to-computer services are inherently arbitrary, and phone-to-phone IP services increasingly involve net protocol conversions and are enhanced services under the Commission's rules for this reason alone. In this regard, IXCs are increasingly able to obtain local originating or terminating services – from CLECs and in some

[42] *See, e.g.*, BellSouth at 1; GVNW Consulting at 5; ICORE at 3; TCA at 7; USTA at ii.

[43] *See* BellSouth at 6-9; Qwest at 6-9; SBC at 6-8; Verizon at 2-4.

cases ILECs – that transmit signals in IP rather than TDM protocol such that calls involve net protocol conversions for this additional reason.[44]

A rule that would impose access charges on those phone-to-phone IP telephony calls that are telecommunications would thus also discriminate among phone-to-phone IP telephony calls that make identical uses of local networks. Because of the anomaly of this result, SBC is reduced to arguing that access charges should also apply to phone-to-phone and computer-to-phone services that are enhanced services, contrary to the ESP exemption.[45] SBC's position requires some exception in the public interest to Rule 69.5 or to Rule 64.702 and the only question is whether the exception should extend bloated charges to enhanced services or should exempt similar or indistinguishable telecommunications services from those bloated charges and stifle innovation and investment. Under the Commission's settled policy, the answer to that question is clear.

In addition, the evolving and integrated nature of IP services renders regulations designed for traditional telecommunications inappropriate and inherently arbitrary. IP technology permits an array of integrated enhanced and basic service offerings to be provided over a single platform. IP technology blurs distinctions traditionally drawn between services such as local and long distance calling, voice, fax, data and video, making it impossible to form

[44] *See* Level 3 at 13; The Von Coalition at 2-3.

[45] *See* SBC at 13 & n.34.

rational and non-transient regulations.[46] The multifunctional nature of the IP network means that a phone-to-phone IP telephony call could be integrated with other, enhanced services, or, alternatively, the call itself could have enhanced functions.[47] A service that might at its inception meet the technical definition of a "telecommunications service" could be combined with features that render it an enhanced service within a short period of time. Because of the rapid evolution of such services, regulatory categories that initially appear appropriate for such services could quickly prove to be inapposite.

The Commission foresaw these current difficulties in the *Universal Service Report*, where it observed that any attempt to distinguish between phone-to-phone and other forms of IP telephony could "be quickly overcome by changes in technology."[48] Chairman Powell separately recognized that any attempt to impose access charges on VOIP services on the ground that they currently resemble basic telecommunications services risks being "almost

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[46] As Level 3 explains, voice is actually merely one application of an integrated voice, data, and enhanced services platform, and voice services are not stand-alone offerings, but can inherently be combined with other applications. *See* Level 3 at 13. Even those voice services that are currently stand-alone will likely evolve into integrated services provided over an enhanced services platform. *See id.* As IP telephony develops, the trend is toward hybrid applications that offer voice along with a variety of data services. *See, e.g.*, *id.* at 12-13; Joint Comments of Ass'n for Communications Enterprises, *et al.* at 20.

[47] Several commenters already provide integrated services, such as WorldCom's "WorldCom Connection," which offers Internet-based applications that combine voice and data. *See* WorldCom at 6. In addition, Global Crossing notes that unique features and enhanced functionalities, such as specialized ring tones, electronic "business cards," or others that we cannot yet conceive of, are sure to proliferate. *See* Global Crossing at 17. AT&T's use of enhanced prepaid calling card services with its VOIP offering is an initial offering of this type.

[48] *Universal Service Report*, ¶ 90.

immediately frustrated by innovative changes to the service and technology that these advanced networks allow."[49]

B. Extension Of Access Charges To VOIP Services Would Create Operational Difficulties.

Premature and arbitrary line-drawing would also create immense operational difficulties, especially in identifying and assessing traffic subject to access charges. Depending on the characteristics of the CPE used and the features that are engaged in any given call, a particular phone-to-phone IP telephony transmission could be either an enhanced or a telecommunications service. Because the nature of each phone-to-phone call varies, the costs to service providers and LECs of monitoring the detailed information necessary to ascertain whether or not a particular call is telecommunications would be immense. Moreover, since, as discussed above, any such distinctions will quickly become obsolete, there are few long-term benefits to be gained by such costly monitoring.

As Level 3 discusses at length in its comments, it may not be possible to segregate TDM-to-TDM VOIP traffic from TDM-to-IP traffic that is provided over the same platform. *See* Level 3 at 14-18. In order to assess access charges, different categories of VOIP traffic would need to be identified. Doing so would create many practical difficulties. First, certain IP voice services could allow calls that originate on the PSTN to be routed to either a TDM or an IP endpoint. To determine whether the call ultimately terminates at a telephone or a computer, such transmissions would need to be monitored on a call-by-call basis – an impractical and costly endeavor. *See id.* at 15; *see also* Joint Comments of Ass'n for

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[49] *Id.* at 11,625 (Powell, Commissioner, concurring).

Communications Enterprises, *et al.* at 19. Moreover, packets initiated from ordinary phones are indistinguishable from other types of packets traveling the network, and can travel over several different routes. *See* Level 3 at 16.[50]

A final operational challenge to assessing access charges is the need to determine whether calls are intrastate or interstate. The Commission's assumption in the *Universal Service Report* that "it may be difficult for the LECs to determine whether particular phone-to-phone IP telephony calls are interstate, and thus subject to the federal access charge scheme, or intrastate," has proven to be prescient.[51] The fact that IP data travels in packets means that "the jurisdictional nature of packets cannot easily be discerned in VOIP services, if at all." *See* Joint Comments of Ass'n for Communications Enterprises, *et al.* at 19. Moreover, an additional obstacle arises from the fact that many VOIP providers do not provide CPN. *See* Time Warner at 5.

C. Extension Of Access Charges To VOIP Services Risks Stunting The Development Of IP-Based Services.

A premature and arbitrary extension of access charges would risk stunting development of IP-based services, including but extending beyond phone-to-phone VOIP. The ILECs argue that applying the Commission's policy is unjustified because the intended

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[50] In addition, the costs of segregating different forms of IP traffic could well be enormous. To ensure that VOIP telephony traffic were properly identified for access charge assessment purposes, basic phone-to-phone voice services may need to be isolated and transmitted over separate access facilities than other VOIP traffic. *See* Level 3 at 17. If such means are used, the costs associated with VOIP will skyrocket, thereby undercutting the efficiencies and the potential for vast consumer benefits that currently render VOIP a truly innovative and valuable technology. *See id.* at 18.

[51] *Universal Service Report*, ¶ 91.

consumer benefits will not occur now that access charges are closer to the costs of providing service than when the Commission originally formulated its policy in 1998.[52] No evidence supports claims that access charges are truly cost-based, and "close to" actual costs is still materially above cost for purposes of stunting the development of these advanced and evolving services. The weakness of the ILECs' arguments is revealed by the vehemence of their separate argument that their revenues and earnings would be dramatically reduced if the Commission continues to allow VOIP providers to pay "only" cost-based local business tariffs.[53] While in recent years the Commission has taken measures to reduce implicit subsidies in access fees, those fees nonetheless remain materially above cost. As the Commission has recently recognized, exemptions from inflated access charges have been and are important to the proliferation of new services.[54] The Commission also noted that access charges continue to exceed the forward-looking cost of providing access services.[55]

Indeed, contrary to the ILECs' arguments,[56] comments in this proceeding underscore both the potential consumer benefits that robust development of VOIP telephony services will provide and the threat to those benefits posed by subjecting VOIP services to

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[52] *See, e.g.*, Fred Williamson and Assoc. at 12; John Staurulakis at 6; OPASTCO at 6; TCA at 5; The Western Alliance at 9.

[53] *See, e.g.*, Beacon at 5-6; Fair Access Charge Rural Tel. Group at 2; Fred Williamson and Assoc. at 19-20; NECA at 6; OPASTCO at 3-4; *see also infra* Section IV.A.

[54] *Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, 16 FCC Rcd. 9610, ¶ 31 (2001).

[55] *See id.* ¶ 7.

[56] Several ILECs appear to favor no protection for the Internet or evolving services. *See, e.g.*, ICORE at 3; Rural Iowa Independent Tel. Ass'n at 5; USTA at 9.

above-cost access charges.[57] Innovative IP technologies offer significant advances over earlier communications products, and permit an efficient and effective integration of voice, data and other services that stands to greatly benefit consumers.[58] The harm to these emerging VOIP and related services due to imposition of access charges is also clear from the record.[59]

Finally, as the Commission recognized in the *Universal Service Report*, ¶ 93, extending access charges to VOIP services could have adverse implications for international settlement rates, for international VOIP services, and for the Commission's related policies. Indeed, contrary to Verizon's claims in this proceeding, it elsewhere has argued that the Commission can rely on VOIP bypass of the international settlement process as an important basis for scaling back its International Settlement Policy.[60] Extending above-cost access charges to domestic VOIP services would directly buttress the defenders of the above-cost international settlement regime.

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[57] *See, e.g.*, NetAction at 1-3 (noting that IP-based services are currently affordable and offer consumer choice).

[58] *See* Alex Lash, *Another Try at Telephony Over IP*, CNET News.Com, Feb. 10, 1998, *available at* http://news.com.com/2102-1033-207995.html; *see also* Prepared Remarks of Michael K. Powell, Chairman, FCC, delivered at the Goldman Sachs Communicopia XI Conference, New York, NY, Oct. 2, 2002, at 2 (calling IP telephony one of the "key sources of revenue growth offering consumers a wealth of new benefits in the years to come.").

[59] For example, several commenters raise concerns that above-cost access charges will impede further growth and innovation. *See, e.g.*, Joint Comments of Ass'n for Communications Enterprises, *et al.* at 2. The potential consumer benefits to be gained from this more efficient technology will be lost if IP service providers are forced to contend with the inefficiencies of legacy networks. *See* Level 3 at 6. Indeed, as smaller providers point out here, removing the exemption "would eradicate what is now a small but promising market for competitively offered Internet telephony." Small Business Survival Comm. at 1; *see also* Southeastern Services, Inc. at 4.

[60] *See International Settlements Policy Reform, International Settlement Rates*, Comments of Verizon, IB Docket Nos. 02-324, 96-261, filed Jan. 14, 2003, at 3-4.

IV. THE ILECS' REMAINING CLAIMS ARE WITHOUT MERIT.

Finally, the ILECs contend that AT&T's position (1) would deny ILECs compensation for the use of their facilities, (2) would imperil universal service, and (3) is inconsistent with AT&T's prior positions and conduct. None of these claims has any basis.

A. The Commission's Policy Enables ILECs To Receive Ample Compensation For Their Services.

The ILECs argue that the Commission's policy does not adequately compensate them for their services.[61] While their desire to secure above-cost access charges is predictable, their assumption that any charge less than the inflated access charge is unreasonable cannot withstand scrutiny. The ILECs provide no evidence that the charges they receive to terminate AT&T's services are insufficient. The Commission's findings in the context of the ESP exemption provide a full answer to the ILECs' claims. There, the Commission found that end-user local line charges fully compensate ILECs for the cost of providing services.[62] The Commission also indicated that the ILECs remain free to limit any hypothetical underrecovery

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[61] *See, e.g.*, Beacon at 5-6; Fair Access Charge Rural Tel. Group at 2; Fred Williamson and Assoc. at 19-20; NECA at 6; OPASTCO at 3-4.

[62] *See Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing End User Common Line Charges*, First Report and Order, 12 FCC Rcd. 15,982, ¶ 346 (1997) ("*Access Reform Order*") ("We also are not convinced that the nonassessment of access charges results in ISPs imposing uncompensated costs on incumbent LECs.").

through recourse to state commissions.[63] The ILECs' comments offer no reason for reaching different conclusions here.[64]

Even if access charges did reflect an appropriate cost-based level of compensation, maintaining the Commission's "wait and see" policy would have a *de minimis* effect on access charge revenues, especially if the current policy remains in place only pending the conclusion of the *Intercarrier Compensation Rulemaking*. It is not disputed that the percentage of IP telephony traffic is minimal, accounting for only 1% - 5% of interexchange calling.[65]

Moreover, even a potentially significant increase in IP telephony traffic would not logically provide sufficient grounds for removing the current exemption. The Commission's policy regarding Internet-based technologies favors protection for evolving service offerings.[66] The prospect of an increase in the volume of those services cannot transform a legacy regulatory

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[63] *See id.* ("To the extent that some intrastate rate structures fail to compensate incumbent LECs adequately . . . incumbent LECs may address their concerns to state regulators.").

[64] Indeed, the Commission has continued to affirm the ESP exemption notwithstanding the rapid proliferation of ISP-bound traffic and other enhanced services since its 1997 *Access Reform Order*, and the growth of IP telephony has not been nearly so rapid or widespread as ISP-bound traffic – and thus should pose fewer concerns.

[65] *See* Probe Research, Inc., *Voice over Packet Markets*, 2 CISS Bulletin 4 (2001).

[66] *See, e.g.*, *Universal Service Report*, at 11,623 (Powell, Commissioner, concurring) ("If innovative new IP services were all thrown into the bucket of telecommunications carriers, we would drop a mountain of regulations, and their attendant costs, on these services and perhaps stifle innovation and competition in direct contravention of the Act."); *Access Reform Order*, ¶ 344 (deciding to maintain the access charge exemption for ESPs in order to "avoid[ ] disrupting the still-evolving information services industry").

scheme that the Commission has found to be inappropriate into a proper framework for IP telephony.[67]

The ILECs' concern that maintaining the IP telephony exemption may signal the eventual demise of the access charge regime provides no basis for denying AT&T's petition.[68] The Commission has repeatedly affirmed a policy objective of favoring rates that reflect true economic cost for all forms of intercarrier compensation.[69] As the Commission has observed, "[t]he new competitive environment envisioned by the 1996 Act threatens to undermine [the access charge subsidy] structure over the long run."[70] Extending the legacy access charge regime to IP telephony services would undermine the Commission's policies, and the broader

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[67] *See Access Reform Order*, ¶¶ 344-46 (extending the ESP exemption notwithstanding the fact that doing so would eliminate the ILECs' ability to collect interstate access fees).

[68] SBC also claims that AT&T is "exploiting" the ESP exemption by subscribing to business line services that are used to terminate calls to nonsubscribers and that by doing so, AT&T is somehow denying SBC any compensation for terminating AT&T's traffic. SBC at 11-13. SBC is wrong on both counts. The ESP exemption allows ESPs to subscribe to business line services, either to connect subscribers to the services or to terminate traffic to nonsubscribers. For in either event, the ESP purchases business lines with sufficient capacity to carry all the ESPs' traffic and compensates the incumbent for the use of the exchange facilities to the same extent that business customers do.

[69] *See, e.g.*, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Order on Remand and Report and Order, 16 FCC Rcd. 9151, ¶ 4 (2001); *Access Reform Order*, ¶¶ 344-45; *Access Charge Reform Price Cap Performance Review for Local Exchange Carriers*, Notice of Proposed Rulemaking, Third Report and Order, and Notice of Inquiry, 11 FCC Rcd. 21,354, ¶ 214 (1996) ("*Price Cap Performance Review*").

[70] *Access Reform Order*, ¶ 32.

implications for the overall access charge regime are best addressed in the comprehensive *Intercarrier Compensation* proceedings.[71]

Certain ILECs also claim that VOIP services use their facilities as traditional telephony does, entitling them to full access charges.[72] But, even if a subsequent rulemaking were to find that certain IP phone services do use ILEC facilities similarly to traditional telephony, the ILECs' conclusion would not follow. The ESP exemption clearly applies when, and notwithstanding the fact that, ESPs use ILEC access services to terminate interstate traffic. The Commission has "acknowledged that ESPs were among a variety of users of LEC interstate access services" and, "despite the Commission's understanding that ISPs use interstate access services, pursuant to the ESP exemption, the Commission has permitted ISPs to take service under local tariffs."[73] Similarly, in the *Universal Service Report*, the Commission confirmed that

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[71] *See Universal Service Report*, ¶¶ 90-93 (bases for addressing particular service offerings in comprehensive proceeding). AT&T has argued in its comments to the *Intercarrier Compensation* proceedings, and maintains here, to the extent the issue arises, that the Commission should adopt a cost-based, uniform intercarrier compensation rule in which "a minute is a minute" for transport and termination purposes, without regard to content, the means of switching in transit, or the identity of either the called party or the carrier. *See Intercarrier Compensation*, Comments of AT&T Corp., CC Docket No. 01-92, filed Aug. 21, 2001, at i.

[72] *See, e.g.*, ICORE at 7; Qwest at 14-15; SBC at 7; Sprint at 7.

[73] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, ¶ 11.

ISPs continue to be exempt from access charges regardless of whether the particular service they offer is identical to that offered by traditional IXCs.[74]

B. The Commission's VOIP Policy Does Not Threaten Universal Service.

The ILECs' claim that the Commission's application of its policy in this case would undermine universal service policies is mistaken in its factual and regulatory assumptions. One threat to universal service is alleged to arise because "[a]ccess charges continue to be an important source of implicit subsidies that are used to maintain universal service for residential local exchange customers." SBC Comments at 18.[75] This claim dramatically overstates any remaining implicit subsidies embedded in access charges following adoption and implementation of the CALLS proposal, which "identif[ied] implicit universal service support still in interstate access charges, remove[d] that support, and then create[d] a mechanism that allows for the

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[74] *See Universal Service Report*, ¶¶ 15, 55 (stating that while Internet service providers in some instances appear to be providing pure transmission capacity, ISPs should be treated as generally not providing telecommunications, and consequently are not subject to access charge assessments). Moreover, the Commission has found that there are no inherent cost differences in terminating traffic to ISPs as compared to other users of the PSTN. *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* ¶90 ("[W]e see no reason to impose different rates for ISP-bound and voice traffic. The record developed in response to the *Intercarrier Compensation NPRM* and the *Public Notice* fails to establish any inherent differences between the costs on any one network of delivering a voice call to a local end-user and a data call to an ISP.").

[75] Certain commenters contend that they rely heavily on access charge revenues for USF subsidies. *See, e.g.*, Beacon at 5-6; Fair Access Charge Rural Tel. Group at 2; ICORE at 7; NECA at 6-7; NTCA at 7-8; OPASTCO at 4. If true, this practice is improper because the Commission has taken significant action to eliminate implicit subsidies in favor of explicit support for universal service. *See infra*. The Commission should investigate these rates, which are not only admittedly above cost but also appear to reflect excess profits rather than USF subsidies.

explicit provision and recovery of interstate access universal service support."[76] That order removed nearly all implicit subsidies for ILECs subject to price caps on July 1, 2000, with residual subsidies at the margins to be phased out thereafter, increasing the SLC progressively through July 1, 2003. For rate of return carriers, the *MAG Order* accomplished a similar removal of implicit subsidies, with elimination of the CCL by July 1, 2003, which is also the date when SLC caps will reach their maximum.[77] As to federal support of local services, the FCC reformed the pre-1996 Act "High-Cost Fund" in the *Universal Service Order*[78] and further modified it for non-rural carriers in the *Methodology Order*,[79] and for rural carriers in the *Rural Task Force Order*.[80] All of these support programs are funded through the federal Universal Service Fund rather than through access charges. In the face of this massive restructuring of access charges and creation of an explicit system of universal service subsidies, SBC relies for its claim of continued implicit subsidy on the Commission's *Use Restriction Report*. The Commission's statement there merely referred to the rationale for the adoption in 1999 of the use restriction,

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[76] *Access Charge Reform*, Sixth Report and Order, 15 FCC Rcd. 12,962, ¶ 194 (2000) ("*CALLS Order*").

[77] *See Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, 16 FCC Rcd. 19,613 (2001) ("*MAG Order*").

[78] *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd. 8776 (1997) ("*Universal Service Order*").

[79] *Federal-State Joint Board on Universal Service*, Ninth Report & Order and Eighteenth Order on Reconsideration, 14 FCC Rcd. 20,432 (1999) ("*Methodology Order*").

[80] *Federal-State Joint Board on Universal Service, Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, Fourteenth Report and Order, Twenty-Second Order on Reconsideration, and Further Notice of Proposed Rulemaking in CC Docket No. 96-45, and Report and Order in CC Docket No. 00-256, 16 FCC Rcd. 11,244 (2001) ("*Rural Task Force Order*").

prior to the access charge reforms, and the Commission immediately thereafter acknowledged that it had "recently taken significant steps in implementing access charge reform."[81] In fact, those significant steps have enabled the Commission to comply with the statutory mandate to make universal support subsidies "explicit," 47 U.S.C. § 254(e), and to eliminate the anticompetitive effects created by implicit subsidies.[82]

The other threat to universal service funding is alleged to arise from a limiting of the contribution base for payments required by section 254.[83] Not only would any impact on the contribution requirement be *de minimis* in light of the limited percentage of IP-based traffic, but the Commission already weighed that consideration in the *Universal Service Report* and there has been no material intervening change in circumstances that the ILECs can document. Moreover, telephone subscribership levels in the United States are currently at their peak.[84] Although some IP telephony providers' end-user revenues are not assessed universal service contributions because they are providing information services, this has not threatened the adequacy of the explicit federal Universal Service Fund, as evidenced by high subscribership

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[81] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd. 9587, ¶¶ 7-8 (2000) ("*Use Restriction Report*").

[82] *See Comsat Corp.* v. *FCC*, 250 F.3d 931, 939-40 (5th Cir. 2001) (Commission obliged to eliminate implicit subsidies); *Alenco Communications, Inc.* v. *FCC,* 201 F.3d 608, 623 (5th Cir. 2000); *Texas Office of Public Utility Counsel* v. *FCC*, 183 F.3d 393, 425 (5th Cir. 1999).

[83] *See, e.g.*, Alaska Exchange Carriers Ass'n at 6; NECA at 6-7; OPASTCO at 4; Sprint at 14; USTA at 10.

[84] *See* Federal Communications Commission, *Telephone Subscribership in the United States* (Nov. 2002).

levels.[85] In any event, USF payments are entirely independent of the access charge obligations at issue here. Section 254 imposes a statutory obligation to make USF contributions, but the Commission's own rule determines the scope of access charges.[86] Out of an abundance of caution, AT&T has paid USF contributions on those phone-to-phone IP services that arguably meet the current telecommunications service definition.

C. AT&T's Request Is Fully Consistent With Both Its Conduct And Prior Positions.

Finally, the ILECs accuse AT&T of inconsistency, on two separate grounds. Neither has merit. First, a few ILECs maintain that AT&T has behaved inconsistently because it has subscribed to and paid for originating access services, but is here contending that the ESP exemption should apply to VOIP services.[87] No inconsistency exists. Under the ESP exemption, a service provider is permitted, but not required, to obtain access by purchasing end-user local services, but is free to order the ILECs' originating switched access services. When AT&T chooses to acquire and pay for switched access, that choice simply reflects a business decision based on the available alternatives and AT&T's own requirements. As Qwest notes, even "[i]f an information service provider purchases Feature Group D from a LEC, it must pay the proper . . . rates." Qwest at 15. Acquiring originating switched access would not transform that ISP into a telecommunications carrier or its services into telecommunications services.

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[85] The existence of high subscribership levels also confirms that universal service is *not* being threatened by IP telephony, even if some states have not yet acted to remove implicit subsidies from *intrastate* access charges.

[86] The Commission could reasonably be understood as not yet determining the regulatory status of VOIP services for purposes of USF contributions. *See Universal Service Report*, ¶¶ 83-93.

[87] *See* OPASTCO at 3; SBC at 2-3; TCA at 6.

For similar reasons, contrary to the claims of some commenters,[88] AT&T is not "mislabeling" its terminating traffic as local traffic by choosing to terminate its IP telephony service through acquisition of CLEC or ILEC services provided pursuant to local business tariffs. The ILECs assume that AT&T must terminate interexchange traffic through ILEC exchange access services, and that other termination choices are inappropriate, based upon 47 C.F.R. § 69.5(b). But this assumption is precisely the point at issue and directly contravenes the Commission's policy in this area. *See* Section I, *supra*. The Commission's policy indicates that AT&T's actions are entirely appropriate and that AT&T may purchase local business services to terminate its IP telephony calls. As the Commission has likewise recognized, the reciprocal compensation regime is not strictly limited to local calls – as shown by the longstanding recognition that ESP traffic is interstate.[89]

Second, other ILECs argue that AT&T's claim in this proceeding is inconsistent with AT&T's comments in the proceedings that led to the *Universal Service Report*.[90] This claim, too, is meritless. The claims that AT&T and other commenters made in that proceeding were rejected by the Commission in the *Universal Service Report*, and consequently, phone-to-phone VOIP services have used business line services to terminate their calls for the past five years. AT&T is here simply seeking ratification and reaffirmation of the Commission's now long-standing policy and the benefit of the same rules that apply to other providers of phone-to-phone IP telephony services.

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[88] *See, e.g.*, Fred Williamson and Associates at 9-10; Qwest at 16-17; SBC at 4-5.

[89] *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Order on Remand and Report and Order, 16 FCC Rcd. 9151, ¶¶ 45-46 (2001).

CONCLUSION

For the reasons stated here and in AT&T's petition, the Commission should reaffirm and apply its IP telephony policy and enter a declaratory ruling that phone-to-phone IP and VOIP telephony services, including the AT&T services described in its petition, are exempt from access charges unless and until the Commission adopts regulations that prospectively provide otherwise.

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January 24, 2003

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[90] *See* BellSouth at 13-14; SBC at 17; TCA at 1-2.

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of January, 2003, I caused true and correct copies of the foregoing Reply Comments of AT&T Corp. to be served on all parties by mailing, postage prepaid to their addresses listed on the attached service list.

Dated: January 24, 2003
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/s/ James R. Wedeking
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APPENDIX A

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